United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

76-1569

To be argued by
ALVIN A. SCHALL

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-1569

UNITED STATES OF AMERICA,

Appellant,

—against—

HERMAN BANERMAN, VINCENT F. CIOFFI, KENNETH R. LEMANSKI, FRANK P. MENGRONE and JOSEPH SCHNITZER,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR APPELLANT

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Issue Presented

This is an appeal by the United States, pursuant to T. 18 U.S.C. § 3731, from an order of the United States District Court for the Eastern District of New York (George C. Pratt *J.*) suppressing evidence against appellees Herman Banerman, Vincent F. Cioffi, Kenneth R. Lemanski, Frank P. Mengrone and Joseph Schnitzer.

The sole issue presented on appeal is whether appellees have established their standing to contest the warrantless search, on September 2, 1975, by agents of the Federal Bureau of Investigation ("FBI"), of the garage in the building at 226 39th Street in Brooklyn, New York.

Preliminary Statement

On December 11, 1975, appellees, together with their co-defendants, Ernest L. Montevecchi and Arnold Schneider, were charged in a two count indictment in the Eastern District of New York with unlawful possession, on September 2, 1975, of a quantity of "Stanley" brand hand tools recently stolen from interstate shipment, T. 18 U.S.C. §§ 659 and 2, and with conspiracy to possess the stolen tools, T. 18 U.S.C. § 371.

On September 29, 1976, after a four day hearing, the United States District Court granted the defendants' motions to suppress all evidence in the case seized as the result of a warrantless search of the building at 226 39th Street in Brooklyn, New York on September 2, 1975 (A. 161).[1] The search was conducted by FBI agents and resulted in the arrest of the defendants and the seizure of the stolen tools and other items of evidence.

Subsequently, the United States moved to reopen the suppression hearing and also sought rehearing of the motion to suppress, on the ground that appellees Banerman, Cioffi, Lemanski, Mengrone and Schnitzer had not established their standing to contest the allegedly illegal entry into 226 39th Street. On November 22, 1976, the district court denied the Government's motion in all respects (A. 274). The United States now appeals, pursuant to T. 18 U.S.C. § 3731, from that part of the November 22nd order which denied rehearing with respect to the

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[1] References preceded by the letter "A" are to pages of Appellant's Appendix. All other references are to pages of the transcript of the suppression hearing held on September 23rd, 24th, 27th, 28th and 29th, 1976.

standing of Banerman, Cioffi, Lemanski, Mengrone and Schnitzer to contest the September 2nd search.[2]

Statement of Facts

A. Evidence at the suppression hearing

The following evidence was presented at the suppression hearing:

Late in August of 1975, a tractor-trailer containing a load of Stanley tools was stolen from the premises of a truck leasing facility in Bridgeport, Connecticut. When stolen, the tools were in interstate shipment from Connecticut to Illinois. Following the theft, the stolen tractor, without the trailer, was recovered on Staten Island (206, 281). Thereafter, on the afternoon of September 2, 1975, FBI agents, in the course of their investigation in the case, established a surveillance of the building at 226 39th Street in Brooklyn, New York (20).

As shown in the photographs on pages 58 and 59 of appellant's appendix, the building at 226 39th Street is a two-story structure located on 39th Street between Second and Third Avenues (21, 214-217, 432-434). The bottom floor is comprised wholly of a garage (217-218, A. 58, 59), while the second floor contains several rooms (445-446, 570-571). The building can be entered in two ways: through a roll-up garage door and through a pedestrian door, both facing 39th Street (A. 58, 59). The pedestrian door is just to the left of the garage door as one faces the building (A. 58, 59). If one enters the

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[2] Defendants Montevecchi and Schneider were also named in the notice of appeal filed on December 1, 1976. By stipulation dated January 10, 1977, the appeal is being withdrawn as against those two defendants.

building through the roll-up door, he finds himself in the garage (A. 58, 59). If one proceeds through the pedestrian door, he steps inside to a stairway immediately in front of him (217). This stairway leads to the rooms on the second floor of the building (570-571). At the foot of the stairs, immediately to the right of the small space just inside the pedestrian entrance, is a door which opens into the garage (A. 58, 59). On page 60 of appellant's appendix is a diagram showing the floor plan of the garage and the pedestrian entrance area (217-218, 221, Government Exhibit 16).

On September 2, 1975, all of 226 39th Street was leased to the "No Name Transportation Company," which had its offices in rooms on the second floor over the garage, facing 39th Street (445-446, 571, A. 58, 59). At the time of the surveillance, defendants Montevecchi and Schneider were partners in "No Name" (719, 771).

Returning to the surveillance of September 2nd, at approximately 2:00 P.M., appellee Schnitzer, driving a green Oldsmobile, followed by appellee Lemanski in a green and silver straight truck with the letters "RVD" on it (the "RVD" truck) exited the Brooklyn-Queens Expressway at 39th Street. After double parking their vehicles adjacent to the garage door of 226 39th Street, Schnitzer and Lemanski entered the building (23-25). A short time later, Lemanski drove a maroon Mack tractor from the garage and parked it in front of the RVD truck. He then reentered 226 39th Street (31).

Shortly after 3:00, a 20 foot straight truck, with a yellow cab and a silver box, drove out of the garage, made a U-turn and then went back into the garage, cab first (31). Shortly after that, Lemanski and defendant Schneider approached the RVD truck and worked to-

gether making repairs on it (31-32). When they had finished, they returned to the garage (34).

At about 3:10 defendant Montevecchi drove up to the building and went inside (33-34), but moments later he and Lemanski returned to the street and apparently made further repairs on the RVD truck, which was still double parked outside (34). Montevecchi then entered the RVD truck and backed it into the garage (39), after which the maroon tractor was also moved into the building (40). The garage door and the pedestrian door were both then closed (40).

At about 5:20 appellee Schnitzer walked out of the building and moved his car to the curb, almost directly in front of the pedestrian doorway from which he had just emerged (48-49). Almost simultaneously, an unidentified male wearing a white T shirt walked out of the building through the pedestrian door and placed two cartons in the trunk of Schnitzer's car. While Schnitzer adjusted the cartons, the same person returned to the building and brought out two more cartons, which were also placed in the trunk (48-49). Schnitzer then closed the trunk of his car, entered the building through the pedestrian door and closed the door behind him (53-54). Moments later, Schnitzer's T-shirted helper exited the building and departed the area (54).

At about 5:45 defendant Schneider opened the pedestrian door, walked out of the building and crossed the street and entered a gray Cadillac parked on the north side of 39th Street (54). Schneider then moved the Cadillac to directly behind Schnitzer's Oldsmobile so that it was parked immediately in front of the closed garage door of No Name Transportation Company (A. 58, 59). Schneider then opened the trunk of the Cadillac and entered the building through the pedestrian doorway (54).

During the afternoon, reports of the activity at "No Name" were transmitted over the radio by the surveillance team to other agents parked in vehicles in the area (26, 209-210). In addition, the agents in the area knew what kind of goods were on the shipment and had received information concerning dimensions of packages and the labels on the Stanley tool cartons (207). Accordingly, shortly after Schneider had parked his car and entered the building, a vehicle occupied by agents John Goode, Walter Quigley, Stephen Morrill and William Hines drove to the front of 226 39th Street (211).

Quigley testified that when he drove up, he observed Schneider at the rear of the gray Cadillac and that when Schneider saw the agents, he turned and fled into the building, at which point Quigley observed Schneider to be carrying a cardboard carton with a yellow label similar to those on the stolen shipment (212-214). Quigley testified that he then pursued Schneider through the pedestrian doorway and arrested him in the garage (215, 217, 222-223). Upon placing Schneider under arrest, the agents discovered on the floor and in trucks parked in the garage (including the RVD truck) cartons of Stanley tools and other items of evidence (224-230).[3]

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[3] Schneider testified at the suppression hearing that he never left the building after he parked his Cadillac and opened the trunk. He said that Quigley suddenly appeared inside the garage and arrested him while he was standing at a work bench (702-704).

At the conclusion of the hearing Judge Pratt stated that he did not believe Schneider's testimony and that he was discounting it (A. 163). However, because of discrepancies and inconsistencies in the testimony of FBI agents, the court also determined that the Government had not met its burden of establishing that Schneider had in fact emerged from the building a second time, gone to his car and then fled back inside at the approach of the agents (A. 170).

In any event, for purposes of the issue raised on this appeal, it is not disputed that Schneider was arrested inside the garage, whether or not he was chased there by the agents.

Shortly after Schneider had been placed in custody, Agent Thomas Armstrong entered the building via the pedestrian doorway (568-569). Seeing no other defendants in the garage, but knowing from radio transmissions which he had received during the surveillance that there were at least three other individuals inside the building (570), Armstrong ascended the stairs rising from the pedestrian door (571). When he reached the top of the stairs, Armstrong heard voices coming from a room at the end of a hallway (571). Proceeding down the hall, Armstrong entered the room and found inside defendant Montevecchi, along with appellees Banerman, Cioffi, Lemanski, Mengrone and Schnitzer (571). Also in the room were Stanley cartons and other items of evidence (573-578, 593). The six defendants were then taken downstairs and placed under arrest (594).

After all seven defendants were in custody, Agent Donald Dowd recovered from appellee Schnitzer the keys to the green Oldsmobile. Using the keys, Dowd opened the trunk of the car and found inside a black briefcase and the four cartons of Stanley tools which Schnitzer had earlier deposited there (687-688).

B. The ruling on the motion to suppress

In opposition to the motion to suppress, the United States argued that the warrantless search and seizure inside the garage were reasonable because the agents entered the building in "hot pursuit" of defendant Schneider, whom they had probable cause to arrest (A. 69-74, 86-87). The cartons and evidence inside the garage, it was contended, were in "plain view" of agents who had a right to be in the place from where they made their observations (A. 72, 87-88). It was further argued that the cartons and evidence seized from the upstairs office came into the "plain veiw" of Agent Armstrong as he was

securing the premises after the arrest of Schneider in the garage, while the briefcase and cartons from the trunk of appellee Schnitzer's car were properly seized after the arrest of the defendants and the seizure inside 226 39th Street (A. 72-73, 88-89). Finally, at the beginning of oral argument on the motion, the Assistant United States Attorney made the concession that all seven defendants had standing to contest all aspects of the searches and seizures inside No Name Transportation Company (A. 76-77).

On September 29, 1976, after hearing argument, the district court orally granted the motion to suppress all evidence recovered from 226 39th Street and from Schnitzer's Oldsmobile (A. 161). In granting the motion, the court concluded that the United States had not met its burden of establishing probable cause for the arrest of Schneider (A. 161-162) and that the prosecution had thus not shown exigent circumstances for the entry into the building. Judge Pratt stated that although he was discounting Schneider's testimony because he did not believe it, he could not find, because of inconsistencies in the testimony of agents, that Schneider had in fact run into the building, the linchpin for the Government's probable cause argument (A. 164-165, 170). The court also determined that there was a significant gap in the Government's proof, in that there was no evidence in the record as to how and why the September 2nd surveillance came to be established at 226 39th Street (A. 162-163).

Following its ruling, the court told the Government that it had 30 days to either file a notice of appeal or a notice of motion to reopen the suppression hearing (A. 171-172, 175-176).

C. The ruling on the motion to reopen the suppression hearing

On October 26, 1976, the United States filed its notice of motion to reopen the suppression hearing (A. 177). In its motion, the Government sought to reopen the hearing to present testimony concerning informant information which led to the surveillance at 226 39th Street (A. 177, 191-192). The Government also sought rehearing on the motion to suppress on the ground that appellees Banerman, Cioffi, Lemanski, Mengrone and Schnitzer had not yet established their standing to contest the search of the garage at 226 39th Street (A. 209-215). On November 5, 1976, after hearing argument, the court orally denied the motion in all respects (A. 269), with a formal written order being entered on November 22, 1976 (A. 274).

ARGUMENT

Appellees Have Not Established Their Standing Under The Conspiracy Count Of The Indictment To Contest The Search Of The Garage At 226 39th Street.

Appellees stand charged with unlawful possession of the stolen Stanley tools and related conspiracy. On appeal, it is the position of the United States that as far as the conspiracy count is concerned, appellees have not established their standing to contest the September 2nd search of the garage at 226 39th Street. Thus, we submit that the district court should not have suppressed, as against appellees, the tools recovered in the garage. We also believe that it was error for the district court to suppress, as the "fruit" of the search of the garage, the evidence found in the upstairs office and in the trunk

of appellee Schnitzer's Oldsmobile. Or, put another way, although appellees do have standing to challenge the search of the upstairs office (and, in the case of appellee Schnitzer, the search of his car), they may not do so on the basis of any illegality in the initial entry into the building. *United States* v. *Tortorello*, 533 F.2d 809, 815 (2d Cir.), *cert. denied*, — U.S. —, 45 L.W. 3300 (1976).[5]

1. The law presently recognizes two ways in which a defendant can claim standing to contest a search and seizure. First, there is the automatic standing rule enunciated in *Jones* v. *United States*, 362 U.S. 257, 263-264 (1960), which "has been questioned" in *Brown* v. *United States*, 411 U.S. 223 (1973), and is of "dubious validity." *United States* v. *Pui Kan Lam*, 483 F.2d 1202, 1205, n.4 (2d Cir. 1973), *cert. denied*, 415 U.S. 984 (1974). The rule affords standing, even though the defendant's Fourth Amendment rights were not violated, where the defendant is charged with a possessory offense, and the possession alleged in the indictment occurred at the same time as the search and seizure. See *Brown* v. *United States*, *supra*, 411 U.S. at 229.

A defendant can also assert actual standing. To do so, however, he must establish "that he himself was the victim of an invasion of privacy." *Jones* v. *United States*, supra, 362 U.S. at 261. In this case, on the conspiracy charge, at least, we submit that the automatic standing rule is not available to the appellees. We further submit that, on the basis of the record before the Court, neither Banerman, Cioffi, Lemanski, Mengrone nor Schnitzer has

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[5] The United States is not precluded by the initial concession from arguing the question of standing. The point was raised below within the time given for moving to reopen the suppression hearing. Moreover, standing is a question of law, and a concession on a question of law is not binding on the Court. *United States* v. *Tortorello*, *supra*, 533 F.2d at 812.

shown how his privacy was invaded by the initial entry into the building. In short, we believe that none of the appellees has established his standing vis-a-vis the garage.

2. Appellees cannot rely on the automatic standing rule, because the rule is only available where "possession at the time of the contested search and seizure is 'an essential element of the crime charged.'" *Brown* v. *United States*, *supra*, 411 U.S. at 227. In this connection, this Court has held that the government is under no obligation to prove possession in a prosecution for conspiracy to possess. *United States* v. *Sacco*, 436 F.2d 780, 784 (2d Cir.), *cert. denied*, 404 U.S. 834 (1971). Put most simply, possession is not an essential element of the crime of conspiracy. *United States* v. *Galante*, — F.2d —, Slip op. 959, 965-966 (2d Cir., December 14, 1976). Hence, appellees have no automatic standing under Count Two of the indictment.[6]

Nor, we submit, can appellees claim any actual standing to challenge the search of the garage, for they have not met their burden of establishing that any privacy

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[6] In *Galante*, this Court stated that until the automatic standing rule was overruled by the Supreme Court, it would continue to follow the rule in the case of possessory offenses, Slip op. at 963-964. Consequently, we are not pressing here our challenge to the ruling of the district court as far as the possession charge in the indictment is concerned. If we are successful on the appeal and if there is a trial in this case, we will move for a severance and will seek to try the appellees on the conspiracy charge alone.

We should point out, however, that we continue to believe that the automatic standing rule is no longer valid after *Simmons* v. *United States*, 390 U.S. 377, 390 (1968); see *United States* v. *Pui Kan Lam*, *supra*, 483 F.2d at 1205, n.4, and that it should be overruled, as the Sixth Circuit has already done. *United States* v. *Delguyd*, 542 F.2d 346, 350 (6th Cir. 1976).

right of their's was injured by the entry into the building. *United States* v. *Masterson*, 383 F.2d 610, 613-614 (2d Cir. 1967), *cert. denied*, 390 U.S. 954, *reh denied*, 391 U.S. 909 (1968).

Central to an understanding of the Government's argument with respect to actual standing is a recognition of the basic fact that the Fourth Amendment protects "people, not places." *Katz* v. *United States*, 389 U.S. 347, 351 (1967). Thus, the ability of a defendant to claim the protection of the Amendment depends upon whether that defendant—*and that defendant alone*, *Alderman* v. *United States*, 394 U.S. 165, 171-172 (1969)—can show that the invaded place was an area where he was entitled to "a reasonable expectation of freedom from governmental intrusion." *Mancusi* v. *De Forte*, 392 U.S. 365, 368 (1968). Here, with respect to the garage, appellees have not made such a showing.

Appellees could perhaps begin to demonstrate an expectation of privacy in the garage if they had shown either a proprietary or a possessory interest in 226 39th Street. *Brown* v. *United States*, *supra*, 411 U.S. at 229. However, the record fails to indicate that either Banerman, Cioffi, Lemanski, Mengrone or Schnitzer possessed any interest-possessory, proprietary or otherwise—in the building. And, "[o]ne who conceals contraband or stolen goods on the premises of another does not thereby acquire an interest in those premises." *United States* v. *Galante*, *supra*, Slip op. at 968. See also *United States* v. *Tortorello*, *supra*, 533 F.2d at 812-814; *United States* v. *Sacco*, *supra*, 436 F.2d at 784. Thus, unlike both Montevecchi and Schneider, who were partners in No Name Transportation Company (Statement of Facts, *supra*, at p. 4),

appellees are not entitled to claim standing on the ground that they possessed an interest in the premises searched.[7]

Similarly, appellees can hardly claim that any right of privacy of their's was injured simply because they were in the upstairs office when the agents entered the building. Being a personal right, the protection of the Fourth Amendment "extends to a certain area around a person," an area which "moves with the person and changes with the environment in which a person finds himself." *United States* v. *Calhoun*, 510 F.2d 861, 866, n.4 (7th Cir.), *cert denied*, 421 U.S. 950 (1975). Here, the reasonable expectation of freedom from governmental intrusion which appellees clearly possessed in the office did not extend to the garage. As already discussed, none of the appellees presented any evidence showing an interest in the garage. Just as importantly, however, the garage on the ground floor was a part of the building totally separate and distinct from the upstairs office where appellees were arrested. As far as the record shows, when the FBI entered the building, the privacy of Banerman, Cioffi, Lemanski, Mengrone and Schnitzer was not violated any more than the privacy of strangers walking

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[7] Moreover, an interest in the searched area is only one factor to be considered in assessing the presence of a reasonable expectation of privacy. *United States* v. *Bell*, 457 F.2d 1231, 1239 (5th Cir. 1972). Thus, an individual may have a proprietary interest, but at the same time, because of the particular circumstances involved, no reasonable expectation of privacy in a searched area. In *United States* v. *Nunn*, 525 F.2d 958 (5th Cir. 1976), for example, the court held that the owner of a truck did not have standing to challenge the search of the truck where he was not the person who was driving the vehicle when it was searched.

on the Street. Thus, appellees cannot claim standing with respect to the garage simply because of their presence in the upstairs office. See, generally, Trager and Lobenfeld, *The Law of Standing Under the Fourth Amendment*, 40 Brooklyn Law Rev. 421 (1975).

In conclusion, then, we submit that appellees have not established their standing to contest the entry of the FBI into 226 39th Street. Thus, they cannot challenge the entry into the upstairs office on the basis of any argument predicated on the illegality of the garage search. Put most simply, since appellees have not shown "standing to contest the legality of the garage search, the information obtained from that search was not illegally obtained as far as [they are] concerned." *United States* v. *Tortorello*, *supra*, 533 F.2d at 815. Accordingly, it was error for the district court to suppress, as against appellees, the Stanley tools found in the garage. In addition, the court should not have suppressed the evidence from the upstairs office and from the trunk of Schnitzer's car without first determining that those searches were in and of themselves improper, separate and apart from, and independent of, any illegality in the initial entry into the building.

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[8] Cf. *United States* v. *Miller*, 449 F.2d 974, 977-978 (D.C. Cir. 1971), (defendant lawfully in a doctor's office had standing to challenge the entry of the police into the room, but lacked standing to contest the search of drawer, in the same room, which he had no authority to use.); *Northern* v. *United States*, 455 F.2d 427, 430 (9th Cir. 1972) (defendant who was arrested inside a two-bedroom apartment did not have standing to contest the search of the bedroom which was used exclusively by his roommate, where the defendant was present in the apartment during the search but claimed no interest in the property seized).

CONCLUSION

That portion of the order of the district court which denied rehearing of the motion to suppress on the question of standing should be vacated, and the case should be remanded to the district court for further proceedings.

Dated: Brooklyn, New York
January 12, 1977.

Respectfully submitted,

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Joanne Bracco being duly sworn,

deposes and says that he is employed in the office of the United States Attorney for the Eastern District of New York.

That on the 14th day of January 19 77 he served a copy of the within

2 copies of the Brief for the Appellant

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See Attached sheet

and deponent further says that he sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Court House, 225 Cadman Plaza East, Borough of Brooklyn, County of Kings, City of New York.

Joanne Bracco

Sworn to before me this

14th day of January 19 77

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